

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

SHAWN SCRIBNER,
Petitioner,

v.

DEPARTMENT OF DRIVER
SERVICES,
Respondent.

MAY 31 2017

Docket No.: 1715842
1715842-OSAH-DDS-ALS-25-Teate

Agency Reference No.: 058668823

AMENDED FINAL DECISION
ORDER GRANTING MOTION FOR RECONSIDERATION

I. Introduction

This matter is an administrative review of the decision of Respondent, the Department of Driver Services, to suspend Petitioner's driver's license or privilege to drive in the State of Georgia pursuant to O.C.G.A. § 40-5-67.1. The hearing took place on April 6, 2017 before the undersigned administrative law judge.

Following the hearing, and after receipt of a CD containing bodycam footage of the DUI arrest,¹ the Court issued a Final Decision affirming Respondent's action on May 10, 2017. On May 15, 2017, Petitioner filed a motion for reconsideration, arguing therein that the bodycam footage showed that Officer John Gwinn, the arresting officer in this matter, read the implied consent warning to Petitioner prior to placing him under arrest.

Having carefully reviewed Petitioner's motion and the evidentiary record, Petitioner's motion for reconsideration is **GRANTED**, the Decision issued May 10, 2017 is **VACATED**, and Respondent's action is **REVERSED** for the reasons stated below.

¹ As provided in the original Final Decision, the bodycam footage is admitted into the record as Petitioner's Exhibit 1, subject to Respondent's objection within the ten-day reconsideration period.

II. Findings of Fact

1. On October 16, 2016, Officer Gwinn responded to the scene of a motor vehicle collision involving a vehicle driven by the Petitioner, who was 18 years old. The collision did not result in a serious injury or fatality. (Testimony of John Gwinn, arresting officer).

2. While speaking with the Petitioner, Officer Gwinn noted that the Petitioner exhibited glossy eyes, slurred speech, confusion, and an odor of an alcoholic beverage. (Testimony of Officer Gwinn).

3. Officer Gwinn did not ask the Petitioner to perform field sobriety evaluations. (Testimony of Officer Gwinn).

4. Upon determining that Petitioner had been the driver of the vehicle involved in the collision, Officer Gwinn immediately read the implied consent notice for drivers under the age of 21 to him. In reviewing the bodycam footage, it is evident that Petitioner was not under arrest at the time Officer Gwinn read the implied consent notice. Prior to the officer's reading of the notice, Petitioner was not in custody; he was not in handcuffs and he was freely talking on his cell phone. Moreover, at no point did Officer Gwinn, or any officer at the scene, inform Petitioner that he was under arrest. Officer Gwinn placed Petitioner in handcuffs and took him into custody only after he finished reading the implied consent notice to him. (Petitioner's Exhibit 1).

III. Conclusions of Law

1. Motions for reconsideration should be granted only in "certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice." Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995). In

order to obtain reconsideration, “[the movant] must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” Coppage v. United States Postal Serv., 129 F. Supp. 2d 1378, 1379 (M.D. Ga. 2001); see 56 Am. Jur. 2d Motions, Rules, and Orders § 40 (2015). Reconsideration is an extraordinary remedy to be applied sparingly. Coppage, 129 F. Supp. at 1379. In the present case, Petitioner has demonstrated the necessity for reconsideration of the Final Decision issued May 10, 2017.

2. This appeal arises under Georgia’s Motor Vehicle and Traffic laws. O.C.G.A. § 40-5-67.1. Respondent bears the burden of proof. GA. COMP. R. & REGS. 616-1-2-.07. The standard of proof is a preponderance of evidence. GA. COMP. R. & REGS. 616-1-2-.21.

3. O.C.G.A. § 40-5-55(a) provides that:

[a]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities.

O.C.G.A. § 40-5-55(a).

4. Code Section 40-6-392 requires the arresting officer to advise the arrestee of her rights to a chemical test or tests at the time of the arrest. O.C.G.A. § 40-6-392(a)(4). In Perano v. State, the Supreme Court of Georgia held that this statute requires that the implied consent notice be read either “at the time of arrest, or at a time as close in proximity to the instant of arrest as the circumstances of the individual case might warrant.” Perano v. State, 250 Ga. 704, 708 (1983). The Georgia Supreme Court held in Hough v. State that, based upon the clear language of the implied consent statutes, “a suspect who is not involved in a traffic accident resulting in serious injuries or fatalities must be placed under arrest *before* implied consent rights are read to him.” Hough v. State, 279 Ga. 711, 716 (2005) (emphasis added). Petitioner had not been involved in

a traffic accident resulting in serious injuries or fatalities. Accordingly, he must have been under arrest before Officer Gwinn read the implied consent notice to him.

5. “Georgia law recognizes three tiers of police-citizen encounters: (1) consensual encounters; (2) brief detentions that must be supported by reasonable suspicion; and (3) arrests, which must be supported by probable cause.” State v. Norris, 281 Ga. App. 193, 194 (2006); O’Neal v. State, 273 Ga. App. 688, 690 (2005). “A law enforcement officer’s stop and detention of a motorist to investigate a possible DUI violation is a second-tier encounter.” State v. Norris, 281 Ga. App. 193, 194 (2006). The requirement that the arresting officer read the implied consent notice to the individual is triggered when the second-tier investigative detention escalates into a third-tier custodial arrest. State v. Norris, 281 Ga. App. 193, 195 (2006); see also Plemmons v. State, 326 Ga. App. 765, 768 (2014).

6. The test for determining whether a person has been placed under custodial arrest is whether the individual was [1] *formally arrested* or [2] *restrained to a degree associated with a formal arrest*, not whether the police had probable cause to arrest. The test ... is whether a reasonable person in the suspect’s position would have thought the detention would not be temporary [I]t is the reasonable belief of an ordinary person under such circumstances, and not the subjective belief or intent of the officer, that determines whether an arrest has been effected.

State v. Norris, 281 Ga. App. 193, 195-196 (2006) (emphasis added).

7. At the time Officer Gwinn read the implied consent notice to Petitioner, Petitioner was not under arrest. Neither Officer Gwinn nor the other officers at the scene of the collision informed Petitioner that he was under arrest. Moreover, prior to the time Officer Gwinn began reading the notice, Petitioner’s liberty had not been restrained to a degree associated with formal arrest, such that a reasonable person in his position would have concluded that the detention was not temporary. Norris, 281 Ga. App. at 196. Accordingly, the officer’s reading of implied

consent was invalid, and Respondent is not authorized to suspend his license pursuant to O.C.G.A. § 40-5-67.1.

IV. Decision

IT IS HEREBY ORDERED that Petitioner's motion for reconsideration is **GRANTED**, the Final Decision issued May 10, 2017 is **VACATED**, and the decision of Respondent to administratively suspend Petitioner's driver's license, permit, or privilege to operate a motor vehicle or commercial motor vehicle in this state is **REVERSED**.

SO ORDERED this 31st day of May, 2017.


STEVEN W. TEATE
Administrative Law Judge

The seal is circular with a dotted border. The outer ring contains the text "STATE OF GEORGIA" at the top and "ADMINISTRATIVE LAW JUDGE" at the bottom. The center of the seal features a depiction of a classical building with columns and a pediment.